

CASES IN COMMUNICATION LAW



Second Edition

EDITED BY
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ating the same incentive by adopting the same position as a matter of unbroken practice.

For the several reasons stated, we find no Copyright Clause impediment to the CTEA's extension of existing copyrights.

Petitioners separately argue that the CTEA is a content-neutral regulation of speech that fails heightened judicial review under the First Amendment. We reject petitioners' plea for imposition of uncommonly strict scrutiny on a copyright scheme that incorporates its own speech-protective purposes and safeguards. The Copyright Clause and First Amendment were adopted close in time. This proximity indicates that, in the Framers' view, copyright's limited monopolies are compatible with free speech principles. Indeed, copyright's purpose is to *promote* the creation and publication of free expression. The Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas.

In addition to spurring the creation and publication of new expression, copyright law contains built-in First Amendment accommodations. First, it distinguishes between ideas and expression and makes only the latter eligible for copyright protection. Specifically, [the law] provides: "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work." This "idea/expression dichotomy" strikes a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression. Due to this distinction, every idea, theory, and fact in a copyrighted work becomes instantly available for public exploitation at the moment of publication.

Second, the "fair use" defense allows the public to use not only facts and ideas contained in a copyrighted work, but also expression itself in certain circumstances. The defense provides: "The fair use of a copyrighted work, including such use by reproduction in copies for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright." The fair use defense affords considerable latitude for scholarship and comment, and even for parody.

The CTEA itself supplements these traditional First Amendment safeguards. First, it allows libraries, archives, and similar institutions to "reproduce" and "distribute, display, or perform in facsimile or digital form" copies of certain published works "during the last 20 years of any term of copyright . . . for purposes of preservation, scholarship, or research" if the work is not